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91-2054

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Petitioners,

v.

VINCENT JAMES LANDANO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court-created presumption that all persons who knowingly provide information to the FBI in the course of a criminal investigation do so under an implied assurance of confidentiality, for purposes of FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), violates the requirement of 5 U.S.C. § 552(a)(4)(B) that federal agencies bear the burden of proof in justifying FOIA exemptions?

PARTIES TO THE PROCEEDING

The Petition accurately sets forth the parties to this proceeding.

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5 U.S.C. § 552(a)(4)(B) 1, 7

The respondent, Vincent James Landano, respectfully requests that the Court deny the Petition for writ of certiorari seeking review of the Third Circuit's judgment in this case.

OPINIONS BELOW

The Petition accurately sets forth the opinions below.

JURISDICTION

The Petition properly invokes the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provision cited by the petitioners, this matter involves 5 U.S.C. § 552(a)(4)(B) which provides in pertinent part as follows:

> (B) On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records . . . In such a case, the Court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

STATEMENT

1. The respondent will not, at this procedural juncture, attempt to set forth facts supporting his position on

the merits. The purpose of this Statement is solely to set forth facts bearing upon reasons for denial of certiorari and to correct an important inaccuracy in the Petition.

2. Contrary to the FBI's representation, the Superneau declaration did not "discuss *in detail* the FBI's rationale for invoking . . . particular exemption[s] . . . " (Petition at 4) (Emphasis supplied) Importantly, the Superneau declaration is so lacking in detail that it fails to state whether any of the interviewees who provided information to the FBI were ever told (a) that they were speaking to FBI agents or (b) that they were being interviewed in furtherance of a criminal investigation. (App.[1], 25a, n.4 and text)

3. The FBI inaccurately minimizes its role in the John Snow murder investigation by stating that "Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects." (Petition at 2, n.1) In fact, it is uncontroverted in the record below that the FBI, pursuant to an executive order, was actively involved in the *entire* John Snow murder investigation as part of a team of federal, state and local investigators and prosecutors that interviewed numerous witnesses, and gathered and analyzed physical evidence. (See respondent's Supplemental Appendix below at SA5 to SA13) The district court found "an investigative relationship between the ultimate prosecution of this matter and the FBI." (App., 58a) The district court adopted findings (App., 58a) it had made in

[1] The citation refers to the Appendix to the FBI's Petition.

another proceeding, *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989) rev'd 897 F.2d 661 (3d Cir.) cert. denied 111 S.Ct. 46 (1990) that the investigators and prosecutors in this case had engaged in misconduct justifying issuance of a writ of habeas corpus and determined that the public had a right to know, via FOIA, whether and to what extent the FBI participated in what the district court characterized as the "tainted coordinated activity" (60a) of the federal/state/local team that investigated and prosecuted the criminal case against Mr. Landano.

In sum, the district court found a substantial nexus between the FBI and the investigative/prosecutive activity of state and local authorities who violated Mr. Landano's rights.[2] That fact is relevant to Mr. Landano's cross-petition for certiorari. The legal implications of that nexus are discussed there.

REASONS FOR DENYING THE PETITION

Respondent cannot, in candor, contest the FBI's claim that the Third Circuit's ruling reflects a split of authority among the circuit courts with regard to Exemption 7(D). Nor can respondent claim that the issue is not important. Indeed, if the FBI prevails here, as it has in various circuits, the FBI will, in effect, no longer be covered by FOIA. It is, after all, the FBI's position that any time any person or entity communicates with the FBI about any

[2] The Third Circuit, too, accurately states that "The FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder." (App., 2a)

criminal matter they must be presumed to be confidential informants and their identities and *all* information they provide is exempt from public disclosure under Exemption 7(D), unless the FOIA applicant can overcome the presumption of confidentiality. Typically, the FOIA applicant will not know who or what the FBI is concealing and will therefore be unable to overcome any presumption of confidentiality. The District of Columbia Court of Appeals has candidly characterized the presumption the FBI seeks as nearly irrebuttable:

> We readily admit that the presumption we applied in *Keys [v. United States Dept of Justice,* 830 F.2d 337 (D.C. Civ. 1987)] and especially in *Schmerler [v. FBI,* 900 F.2d 333 (D.D.C. 1990)] in practical terms comes close to an irrebuttable one.

Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 577.

Notwithstanding the split in the circuits and the importance of the issue, the record in this case is not adequate to properly present to this Court the issue posited in the Petition.

The Third Circuit concluded that the Superneau declaration, upon which the FBI rests its case, is so deficient that even if that Court had adopted the FBI's position – that anyone speaking to the FBI is presumed to have done so under an implied assurance of confidentiality – nevertheless the outcome of the case would have been the same because the FBI never even alleged that interviewees *knew* they were communicating with FBI agents

about a criminal investigation. The relevant text of the Circuit's opinion is as follows:

> The issue for decision is thus whether the fact that the source supplied information to the FBI in the course of a criminal investigation is alone sufficient to support an inference that the source probably had a reasonable expectation that no unnecessary disclosure of his or her cooperation would occur. This, we believe, is a close question.[4]

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[4] If one were to answer this question in the affirmative, one might still insist on a more specific record than we have before us in this case. That record, for example, does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought. while we can appreciate that insurmountable recordkeeping problems might be created by a requirement that the overall circumstances of each interview be included in the FBI affidavit, it is not apparent to us why some representation could not be made on this score based on the agents' notes or consistent FBI practice.

(App., 25a, n.4 and text)

The foregoing record deficiency is fatal to the FBI's Petition. The circuit decisions the FBI relies upon and asks this Court to approve, derive an implied assurance of confidentiality from the fact of interviewees *knowingly* speaking to the FBI. In *Keys v. U.S. Dept. of Justice,* 830 F.2d 337 (D.D. Cir. 1987) the Court stated that:

> [T]he circuits agree without dissent that courts should find an assurance of confidentiality *where it is reasonable to infer from the circumstances that its absence would impair the Bureau's ability to elicit the information.*

Id. at 345. (Emphasis supplied)

Obviously, the FBI's "ability to elicit information" from persons who do not *know* they are speaking to FBI agents, cannot be impaired by any court decision concerning the FBI and Exemption 7(D), whether for or against a presumption of confidentiality. Such unwitting interviewees cannot possibly perceive themselves as being the beneficiaries of an implied assurance that the FBI will keep their identity and information confidential. Because the FBI failed to assert in the Superneau declaration that the interviewees knew or were told they were being interviewed by the FBI in the course of a criminal investigation, this case does not factually pose the question raised in the Petition, to wit, whether a promise of confidentiality is "inherent whenever the FBI gathers information during a criminal investigation . . . " (Petition, I)

Thus, if this Court were to decide the only issue *factually* presented here – whether there is an implied assurance of confidentiality for purposes of 7(D) even when an interviewee does not know he or she is being interviewed by the FBI[3] – the split of authority in the Circuits would remain unresolved. Accordingly, this matter is not worthy of certiorari.

If this Court decides, nevertheless to grant certiorari, it should not certify the question as presented by the FBI. The Court of Appeals for the District of Columbia Circuit, unlike the FBI here, has candidly presented the issue as one concerning the existence of a presumption in favor of

[3] Respondent is not aware of any published opinions concerning this issue, the real issue posed factually by the underlying record.

the FBI that anyone speaking to the FBI does so under an implied assurance of confidentiality, for purposes of Exemption 7(D). *Dow, supra,* 917 F.2d at 577. Judge Edwards, concurring, expressed his opinion that such a presumption, given its irrebuttability as a practical matter, violates FOIA's requirement that "the burden is on the agency to sustain" the invocation of any FOIA exemption. 5 U.S.C. § 552(a)(4)(B).

Thus if certiorari is granted the following question, not the FBI's question, should be certified:

> Whether a court-created presumption that all persons who knowingly provide information to the FBI in the course of a criminal investigation do so under an implied assurance of confidentiality, for purposes of FOIA Exemption 7(D), 5 U.S.C. (b)(7)(D) violates the requirement of 5 U.S.C. § 552(a)(4)(B) that federal agencies bear the burden of proof in justifying FOIA exemptions.

CONCLUSION

For the foregoing reasons, the FBI's Petition should be denied. In the alternative, the respondent's formulation of the question presented should be adopted.

Respectfully submitted,

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DATED: July 22, 1992